

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 4, 2007 Session

KELLY AND RONNIE MUNCEY v. LISA ANN PHILLIPS, ET AL.

**Appeal from the Circuit Court for Davidson County
No. 05C-3734 Hamilton V. Gayden, Jr., Judge**

No. M2006-01763-COA-R3-CV - Filed September 27, 2007

Plaintiffs appeal the trial court's denial of their motion to alter or amend. After the trial court granted the defendant doctor summary judgment in this medical malpractice action, plaintiffs attempted to offer countervailing medical proof. Finding the trial court did not abuse its discretion, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT HOLLOWAY, SP. JJ., joined.

Jola Moore, Nashville, Tennessee, for the appellants, Kelly and Ronnie Muncey.

C. Bennett Harrison, Jr., Brian Holmes, Nashville, Tennessee, for the appellee, Lisa Ann Phillips.

OPINION

The Munceys appeal the trial court's refusal to grant their motion to alter or amend the order granting Dr. Phillips summary judgment in this medical malpractice matter. This appeal pertains solely to the summary judgment granted Dr. Phillips.

Mr. & Mrs. Muncey sued Skyline Medical Center ("Skyline") and Dr. Lisa Ann Phillips claiming medical malpractice concerning the delivery of her son. The Munceys first sued Skyline and Dr. Phillips in April of 2004. Dr. Phillips then filed a motion for summary judgment in September of 2004 supported by her affidavit under Rule 56 of the Tennessee Rules of Civil Procedure. Upon plaintiffs' request, the trial court postponed the hearing on the motion in order to give plaintiffs additional time to present evidence to oppose the motion. At the December hearing plaintiffs' counsel was informed by the court that the physician's affidavit offered by plaintiffs was insufficient on a number of points to defeat Dr. Phillips' summary judgment request. The trial court then offered plaintiffs the option to take a voluntary nonsuit without prejudice. Over the defendants' objections, the case was nonsuited on or about December 8, 2004.

One year later, on December 7, 2005, the plaintiffs refiled their action against Skyline and Dr. Phillips. On April 4, 2006, Dr. Phillips filed another motion for summary judgment relying on her same affidavit offered in the action that had been nonsuited. Since plaintiffs offered no evidence to defeat Dr. Phillips' motion, the trial court granted Dr. Phillips request for summary judgment in the second suit on May 18, 2006, finding "plaintiffs have had an adequate opportunity to obtain and present to the court the evidence necessary to defeat Dr. Phillips' motion."

The plaintiffs then filed a motion to alter or amend the order granting summary judgment on June 16, 2006. Accompanying plaintiffs' motion to alter or amend are affidavits from the parties and a physician purporting to refute Dr. Phillips' affidavit. The trial court denied plaintiffs' efforts to revive the case, citing *Chambliss v. Stohler*, 124 S.W.3d 116 (Tenn. Ct. App. 2003), and finding that "plaintiffs have not made a showing as to why they have not been able to obtain the necessary evidence." Plaintiffs appeal the trial court's denial of the motion to alter or amend.¹

ANALYSIS

It is well established that a trial court's ruling on a motion to alter or amend may be reversed only upon an abuse of discretion. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Harris v. Chern*, 33 S.W.3d 741, 746 (Tenn. 2000); *Chambliss v. Stohler*, 124 S.W.3d at 121.

A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545, 551 (Tenn. 2006); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). So long as reasonable minds can disagree as to the propriety of a decision, a trial court's discretionary decision will be upheld. *Eldridge*, 42 S.W.3d at 85. The abuse of discretion standard does not allow the appellate court to substitute its judgment for that of the trial court. *Williams*, 193 S.W.3d at 551.

Our Supreme Court has relatively recently enumerated what standard trial courts are to apply when additional evidence is offered to support a motion to alter or amend a summary judgment;

A party may file a motion to alter or amend a judgment within thirty (30) days after its entry. *See* Tenn. R. Civ. P. 59.04. When additional evidence is presented in support of such a motion, the trial court should consider the factors applicable to a motion to revise a partial summary judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure: the moving party's effort to obtain the evidence in responding to the summary judgment; the importance of the new evidence to the moving party's case; the moving party's explanation for failing to offer the evidence in responding to the summary judgment; the unfair prejudice to the non-moving party; and any other relevant consideration. *Harris v. Chern*, 33 S.W.3d 741, 744

¹ Plaintiffs do not argue that Dr. Phillips' motion for summary judgment was improvidently granted in May of 2006.

(Tenn. 2000) (“Cases analyzing Rule 59.04 motions to alter or amend . . . offer some guidance in determining the standard for revising non-final orders.”).

Stovall, 113 S.W.3d at 721.

The trial court found plaintiffs were “given ample time to find and obtain the necessary evidence to defeat the motion for summary judgment” and that plaintiffs were not diligent in finding a medical expert as was necessary to avoid dismissal on summary judgment.

The Munceys’ affidavits explained that due to health and financial hardships, they changed addresses several times and had their telephone disconnected. Since counsel for the Munceys was unable to locate them, it was difficult to get their input and approval to obtain additional expert testimony. Counsel for the Munceys refiled the suit, although unable to locate her clients, because of concern about the statute of limitations. The Munceys’ counsel attempted to safeguard her clients’ interest although they did not communicate with her. Counsel’s affidavit reveals that she eventually used a private agent to locate her clients. Given the situation, counsel for the Munceys did all she could reasonably be expected to do. While the Munceys found themselves in a difficult personal situation, their failure to communicate with their attorney is the reason no evidence was presented to oppose the summary judgment.

The trial court thoroughly discussed the factors in *Stovall* concerning the Muncey’s actions, *i.e.*, their effort to obtain the expert evidence and their explanation for failing to offer expert testimony. The trial court found the plaintiffs made no showing why they were unable to obtain the evidence earlier. The plaintiffs were aware that an expert would be needed to contradict Dr. Phillips’ affidavit at the time of the summary judgment hearing in the earlier nonsuited action. They had notice of the contents of Dr. Phillips’ affidavit and the necessity of rebutting it with expert proof from a witness who met the statutory requirements for sixteen months prior to the grant of summary judgment herein. The plaintiffs were capable of reaching their attorney but did not do so. Given the numerous opportunities the plaintiffs had been given, the court’s finding on these issues is clearly supported by the record.

While the trial court did not specifically address two of the factors discussed in *Stovall*, we do not find that to be a cause to disturb the court’s conclusion. We conclude the trial court was acting well within its discretion since the Munceys basically took no action whatsoever to pursue their claim against Dr. Phillips.

Since we find the trial court did not abuse its discretion, we affirm the trial court’s denial of plaintiffs’ motion to alter or amend. Costs of this appeal are taxed to Kelly and Ronnie Muncey for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE